

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JASON A. HAYES

Claimant

VS.

APPLEBEE'S NEWTON

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 1,058,936

ORDER

STATEMENT OF THE CASE

Claimant appealed the May 30, 2012, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Joseph Seiwert of Wichita, Kansas, appeared for claimant. John R. Emerson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 14, 2012, preliminary hearing and exhibits thereto; the transcript of the February 21, 2012, deposition of Calvin Wenger; the transcript of the February 21, 2012, deposition of Amanda Byers; the Stipulation filed with the Division of Workers Compensation on March 30, 2012; and all pleadings contained in the administrative file.

ISSUES

Claimant contends he injured his right eye on August 17, 2011, when a particle fell into his eye, resulting in a corneal infection. He requested payment of medical expenses, additional medical treatment and temporary total disability benefits. Respondent's defenses were that claimant never met with personal injury by accident and failed to give respondent timely notice of the alleged accident.

ALJ Moore issued a preliminary Order on March 12, 2012, denying claimant's request for benefits and finding that claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Initially the preliminary Order was appealed, but was dismissed by the Board upon the joint motion of the parties. The parties stipulated into evidence additional medical records and submitted the matter to ALJ Moore upon claimant's Application for Preliminary Hearing. ALJ Moore again found claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent and denied claimant's request for benefits.

The issues before the Board are:

1. Did claimant sustain a right eye injury by accident arising out of and in the course of his employment with respondent?
2. If so, did claimant give respondent timely notice of the accident?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was a bartender for respondent. His duties included dishwashing, greeting customers, taking orders from customers, getting the customers' food orders from the kitchen, making drinks and keeping the bar area clean. On August 17, 2011, claimant was putting glasses on a shelf where there were a lot of dusty glasses. Claimant testified that when putting glasses on the shelf he sometimes hits a glass with another glass. He then opened the dishwasher and some steam came up. It was then that claimant noticed a particle had fallen into his eye. Five to ten minutes later he had right eye irritation. Claimant did not remove his contact lenses or use rewetting drops or saline solution in an attempt to rid himself of the eye irritation.

Claimant has worn contacts since he was 14. At the time of the incident at work, claimant wore extended wear contact lenses. Claimant testified he can wear the extended wear contacts up to 30 days and can clean them as needed. He also uses rewetting drops with the contacts. In the past claimant's eyes have become red, but nothing to the severity associated with this incident.

As a result of the irritation, claimant could not finish his shift. Claimant told Tasha, a manager, about the eye irritation, and was allowed to leave early. That evening before he left work, claimant also spoke to Michelle, another manager, about the right eye irritation. He did not tell either Tasha or Michelle that the right eye irritation was work related. That night he attempted to flush out the right eye with rewetting drops and saline solution, which seemed to help. Claimant did not remove his contact lens that night. The

next morning when claimant woke up, his right eye was matted and red and he removed the contact lens. At the preliminary hearing, claimant testified he has not worn contact lenses since then.

On Thursday, August 18, 2011, claimant sought treatment for his right eye from Health Ministries in Newton, Kansas, but it had no ophthalmologist on staff. Claimant went to see optometrist Dr. Scott Trunecek on Friday, August 19, 2011, at 9:30 a.m. He diagnosed claimant with a corneal ulcer and prescribed an ointment and an antibiotic.

Claimant testified that following his appointment with Dr. Trunecek, claimant went to respondent and told Calvin Wenger, general manager, about the injury. Claimant testified he told Mr. Wenger the right eye injury occurred at work on August 17, 2011. Mr. Wenger indicated an incident involving a spider bite on the eye had happened to Alexis, another worker. Amanda Byers, claimant's girlfriend, accompanied claimant to see Mr. Wenger. According to claimant, Mr. Wenger initially was going to have claimant complete paperwork for the injury, but changed his mind and said they would do it later. Claimant never completed the paperwork due to the severity of his right eye problems.

On Saturday, August 20, 2011, claimant saw Dr. Trunecek for a follow-up appointment. The doctor suspected a pseudomonas corneal infection. Dr. Trunecek told claimant to seek treatment at the emergency room as the right eye condition had worsened. Claimant went to Newton Medical Center, but it had no ophthalmologist on staff. Claimant instead saw a Newton optometrist, Dr. Ryan Simmonds, who had claimant seek treatment at Wesley Medical Center in Wichita. Claimant then saw Dr. Kent Potter at Wesley, who immediately referred claimant to the University of Kansas Medical Center (KU Med) in Kansas City, Kansas. Ms. Byers drove claimant to KU Med on August 20, 2011. Claimant stayed at KU Med until August 21, 2011.

Claimant testified that on August 22, 2011, he returned to KU Med for a follow-up appointment. In order to avoid traveling to KU Med every few days, on August 24, 2011, claimant began seeing Dr. Dasa Gangadhar at Grene Vision Group in Wichita. Dr. Gangadhar provided treatment and has recommended claimant have a right corneal transplant. Claimant testified the vision in his right eye is blurred, impaired and is light sensitive.

Claimant was not asked if he told any of the medical providers about a particle falling into his right eye.

Calvin Wenger testified that on August 19, 2011, he received a telephone call from claimant indicating he had a problem with his eye and could not come to work that day. Later that day Mr. Wenger had a meeting with claimant, and Ms. Byers was present. Claimant had a patch on his right eye. According to Mr. Wenger, claimant said he was immediately going to Lawrence or Kansas City for treatment of the right eye. Mr. Wenger indicated to claimant that a leave of absence form would have to be completed. After

realizing claimant had only been working for respondent for a week or so, Mr. Wenger indicated he would have to ask someone in human resources if claimant qualified for a leave of absence. Mr. Wenger testified that during both conversations he had with claimant on August 19, 2011, claimant never indicated he injured the right eye at work.

Claimant called Mr. Wenger two weeks later to give him an update on the right eye. Mr. Wenger informed claimant that he did not qualify for a leave of absence and would have to reapply for his job after recovering. He testified claimant never stated his right eye was injured at work.

In October 2011, claimant was rehired by respondent. At some point in October or November 2011, Mr. Wenger was told by claimant that a particle fell into his right eye at work on August 17, 2011. An OSHA form, a first report of injury, and an incident report were completed. Mr. Wenger had claimant document the situation. This was the first time Mr. Wenger was aware that claimant was alleging the right eye injury occurred at work. He did acknowledge that claimant behaved as though he had earlier reported the right eye injury as work related. However, no manager reported to Mr. Wenger that claimant suffered an eye injury at work.

Amanda Byers resided with claimant on August 17, 2011. That evening Ms. Byers received a call from claimant to pick him up before his shift was scheduled to end. When claimant got into the car, he asked Ms. Byers to look in his right eye to see if she could see anything in the right eye. Ms. Byers accompanied claimant to each and every medical provider claimant has seen.

Ms. Byers testified that on a Friday when claimant was scheduled to work that was before she and claimant went to KU Med, they stopped at the restaurant. Claimant spoke to Mr. Wenger and Ms. Byers was present during the conversation. Ms. Byers testified that claimant wanted to report the work-related right eye injury to Mr. Wenger and show him the severity of the eye condition. During his conversation with Mr. Wenger, claimant said he left his shift early because something fell in his right eye. Mr. Wenger then told a story of another employee who had been bitten on the face at work by a spider. Mr. Wenger said he would go get paperwork, but then indicated he would call when he had gathered up all the paperwork. Ms. Byers testified claimant told Mr. Wenger he was receiving treatment from KU Med. According to Ms. Byers, Mr. Wenger never spoke to claimant about a leave of absence.

At the preliminary hearing, with the exception of Dr. Trunecek's records, claimant's medical records were made exhibits. On March 12, 2012, ALJ Moore issued a preliminary Order denying claimant's request for payment of medical expenses, medical treatment and temporary total disability benefits. In his preliminary Order issued on March 12, 2012, ALJ Moore stated:

None of the medical records document a work-related injury or trauma to the eye, but there are references to Claimant wearing contacts longer than prescribed, and multiple instances of Claimant denying injury or trauma. The record before the court fails to support Claimant's present contention that he injured his eye at work.¹

That preliminary Order was initially appealed by claimant to the Board. The parties later filed a joint motion to dismiss the appeal, which the Board granted. The parties then stipulated that the records of Dr. Trunecek would be made part of the record. Claimant filed an Application for Preliminary Hearing on April 2, 2012, and the parties agreed to submit the matter to ALJ Moore through written argument without the necessity of another preliminary hearing.

A review of claimant's medical records reveals the following:

Dr. Trunecek: His records indicated claimant rubbed his right eye at work with a contact lens in. Dr. Trunecek's records do not make reference to a particle getting into claimant's right eye. On August 19, 2011, Dr. Trunecek diagnosed claimant with a right corneal ulcer. After seeing claimant on August 20, 2011, Dr. Trunecek suspected a right pseudomonas corneal infection.

Dr. Simmonds: He diagnosed claimant with a possible pseudomonal ulcer and immediately referred claimant to an ophthalmologist in Wichita. His August 20, 2011, notes indicate claimant had a painful right eye of two weeks duration.

Wesley Medical Center: Claimant was seen at Wesley emergency room on August 20, 2011. Registered nurse Carol J. Bliss noted claimant had redness in his right eye for the last three days. Claimant was diagnosed with a corneal infection and referred to KU Med. Wesley's records do not state a cause for claimant's right corneal infection. Nor do they indicate claimant reported a right eye injury.

KU Med: Its records indicate claimant was admitted on August 20, 2011, and saw Drs. Dylan Yu and Jen Spiegel. Dr. Spiegel indicated claimant wears his contacts for two months and cleans them every three days. She noted claimant did not own glasses. The doctor noted claimant uses contact lens solution to clean lenses, but occasionally uses tap water. Claimant denied any recent swimming, hot tubbing or eye injury. Claimant was diagnosed with a right eye corneal ulcer. Dr. Spiegel indicated she educated claimant on daily removal and cleaning of contacts. Handwritten notes in the medical records appear to state claimant was a contact lens wearer with a "poor wearing habit."² Claimant was discharged on August 21, 2011. The records do not indicate claimant's right eye injury occurred at work or was caused by a dust particle.

¹ ALJ Order (March 12, 2012) at 1.

² P.H. Trans., Ex. 2.

Dr. Gangadhar at Grene Vision Group: Dr. Gangadhar first saw claimant on August 24, 2011, and diagnosed him with a corneal ulcer. On September 1, 2011, a medical history questionnaire was completed. It asked if claimant had an eye injury, and “no” was circled. The medical questionnaire was unsigned and was updated again during claimant’s appointments on September 7 and 19, 2011. Claimant’s right eye was tested for a fungus infection, but the results were negative. Dr. Gangadhar’s records do not indicate a cause for claimant’s right eye corneal ulcer. Nor do his records indicate claimant reported a particle falling into his eye or that the right eye was injured at work.

In his May 30, 2012, preliminary Order, ALJ Moore again found claimant failed to prove he sustained a right eye injury by accident arising out of and in the course of his employment with respondent. ALJ Moore stated,

The additional medical record notes that Claimant’s eye began hurting when he rubbed it at work the previous day. There is again no reference to getting a particle of glass in his eye while reaching overhead to put glasses on a shelf, or any accident other than Claimant simply rubbing his eye. The doctor’s assessment is a pseudomonas corneal infection. The record remains devoid of a medical opinion that Claimant’s right eye complaints are the product of a work-related accident. Claimant’s testimony that he suffered a work-related accident when a glass particle fell in his eye is not supported by the record before the court.³

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁵

This Board Member affirms ALJ Moore’s finding that claimant did not prove he suffered a personal injury by accident arising out of and in the course of his employment with respondent. The only evidence that supports claimant’s allegation that he suffered a work-related injury is his testimony and that of his girlfriend. After claimant’s alleged work injury he saw several medical providers, but none of the medical records indicate claimant attributed his right eye injury to a work-related incident. Nor did any of the medical records state that claimant reported a particle fell into his right eye. The medical records indicate

³ ALJ Order (May 30, 2012) at 1.

⁴ K.S.A. 2011 Supp. 44-501b(c).

⁵ K.S.A. 2011 Supp. 44-508(h).

claimant: (1) denied he suffered a right eye injury, (2) wore his contact lenses too long and (3) had a poor contact lens wearing habit. Dr. Trunecek suspected claimant had a pseudomonas corneal infection, which is a corneal infection caused by a bacterium. Dr. Simmonds indicated on August 20, 2011, that claimant had a painful right eye of two weeks duration. If correct, that means claimant's right eye condition began before the August 17, 2011, alleged accident. Simply put, claimant failed to meet his burden of proof that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

CONCLUSION

1. Claimant failed to meet his burden of proof that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

2. The issue of whether claimant gave timely notice of his accident is moot.

WHEREFORE, the undersigned Board Member affirms the May 30, 2012, Preliminary Hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

⁶ K.S.A. 2011 Supp. 44-534a.

⁷ K.S.A. 2011 Supp. 44-555c(k).

c: Joseph Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net; nzager@sbcglobal.net

John R. Emerson, Attorney for Respondent and its Insurance Carrier
jemerson@mvplaw.com; mvpkc@mvplaw.com

Bruce E. Moore, Administrative Law Judge